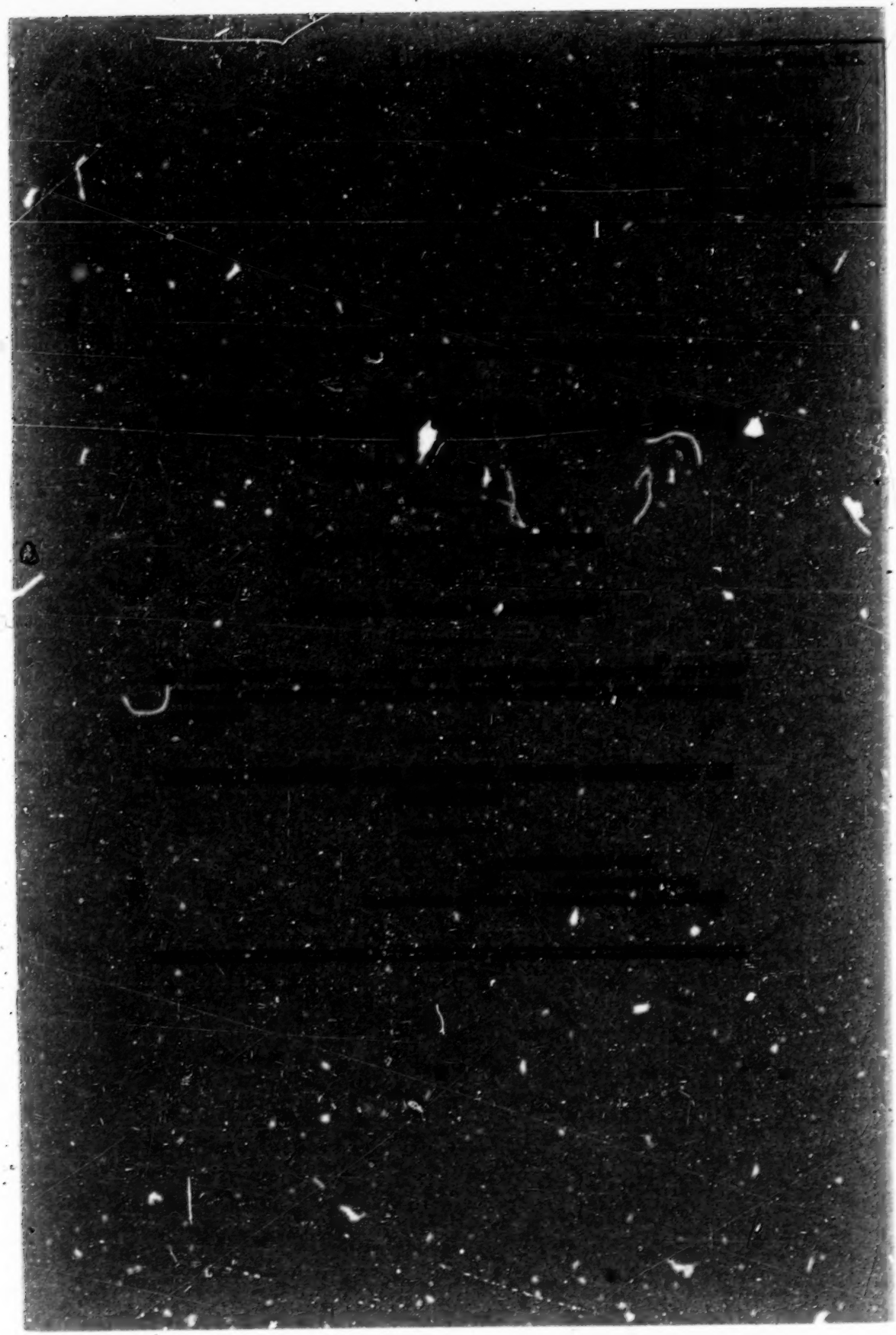

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 745

GIANT FOOD INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

Petitioner operates a chain of more than fifty retail supermarkets located primarily in the Washington metropolitan area (Pet. 7a). In addition to food products and such "soft" goods as clothing, drugs and soap, petitioner sells a wide variety of durable consumer goods such as housewares and electrical appliances. In its newspaper advertising petitioner frequently compared its selling prices with other prices designated as "Regular," "Manufacturer's List," and words of similar import (J.A. 75).[1]

[1] For example: "Regina Polisher & Floor Waxer—$34.97. Mfg. List $64.50" (*ibid.*). ("J.A." refers to the Joint Appendix filed in the court below.)

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After full administrative proceedings, the Federal Trade Commission held that petitioner's use of this comparative pricing was misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) (J.A. 68–73, 75–97), and entered a cease-and-desist order (Pet. 1a–2a). It found that many consumers believe that such words as "Manufacturer's Suggested List Price" mean the "normal", the "going", the "generally prevailing" or the "usual and customary" price at which a product is being sold in the area (J.A. 78). The Commission concluded that there was "a consistent disparity between [petitioner's] advertised manufacturer's list prices and actual selling prices in the trade area" (J.A. 85–86). The court of appeals unanimously affirmed (Pet. 3a–23a).

The only question presented relates to the scope of the Commission's order[2] which prohibits petitioner from comparing its selling price with the "manufacturer's list price," "suggested list price," or "factory suggested retail price" when the latter are not the prices "usually and customarily" charged for the same merchandise in petitioner's trade area (Pet. 1a–2a). Petitioner asserts that the order (1) is too broad since it forbids misrepresentations made in the store as well as by newspaper advertising, and (2) is unduly vague

[2] Petitioner sets forth a number of "additional questions" it claims will be presented "[i]n the event certiorari is granted" (Pet. 3, note). Since petitioner apparently concedes that these additional questions do not, in themselves, merit plenary consideration by the Court, they are not the subject of this memorandum.

because of its reference to prices "usually and customarily" charged in the area. Both contentions are without merit and plainly present no question warranting further review.

1. Having found that the petitioner's newspaper advertising misled consumers by making false comparisons, the Commission did not abuse its discretion by prohibiting the same pricing methods with respect to in-store display and sale. The shaping of the remedy is peculiarly a matter for the Commission's discretion, and it may "close all roads to the prohibited goal * * *." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 614; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413. Moreover, petitioner did not raise this question before the Commission; it made the argument for the first time in a petition for rehearing in the court of appeals. Accordingly, the argument is not open to it now. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 457–458. The rule barring judicial consideration of points not raised before the agency applies with particular force to petitioner's assertions with respect to the practical difficulties which will arise in correcting false and misleading prices placed upon merchandise by the manufacturer. Had such contentions been made before the Commission, the agency could have considered them in formulating its order.

2. The court of appeals also properly rejected petitioner's contention that the order's reference to prices that are "usually and customarily" charged in the area is too indefinite, because petitioner has no way of determining what such prices are. As the court below pointed out (Pet. 23a), the courts "have upheld orders in analogous cases where the words 'usual and customary' were used, as here, in relation to prices being charged at retail in a particular trade area." Moreover, as the court also noted (*ibid.*), any serious problems which petitioner has may be resolved when it files its proposed plan of compliance.

In short, the Commission's order represents a reasonable effort to correct petitioner's deceptive comparative pricing program and to protect the public from its recurrence, and is as clear and precise as the nature of petitioner's violation permits.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964